



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: O'Gara-Hess & Eisenhardt Armoring Company

File: B-232491

Date: September 23, 1988

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### DIGEST

1. The General Accounting Office will not consider whether a bidder qualifies as a manufacturer under the Walsh-Healey Public Contracts Act; this is a matter for review by the Small Business Administration where small business is involved.
2. Offeror's failure to furnish with its proposal evidence of its "experience, qualifications, financial responsibility and ability to execute the terms of the contract" does not render proposal unacceptable where the information was not to be considered in technical evaluation but, rather, was requested to assist agency in determining responsibility.
3. A below-cost offer under a solicitation for a firm, fixed-priced contract is not legally objectionable where the contracting officer has determined that the firm is responsible, i.e., will be able to perform the contract.
4. Even where agency allegedly "promised" sole-source award to protester, agency acted properly in allowing other firms, including awardee, to submit proposals, thereby maximizing competition.

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### DECISION

O'Gara-Hess & Eisenhardt Armoring Company (O'Gara) protests the selection of Hess & Eisenhardt Manufacturing Company (Hess) for award of a contract under Department of Defense (DOD) request for proposals (RFP) No. MDA946-88-C-0095, for two armored limousines. O'Gara contends that several aspects of the procurement were improper and that it should be awarded the contract. We dismiss the protest.

O'Gara principally contends that Hess is not a manufacturer or regular dealer under the Walsh-Healey Public Contracts

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Act, 41 U.S.C. § 35a (1982), and Federal Acquisition Regulation § 22.606-1(a). O'Gara further contends that the contracting officer failed to investigate whether Hess qualified under the Act, even though O'Gara suspects Hess did not complete the manufacturer/regular dealer certification in the solicitation.

Our Office will not consider whether Hess qualifies as a manufacturer or regular dealer under the Act. Stephan Woods Products, Inc., B-225631, Apr. 1, 1987, 87-1 CPD ¶ 369. The contracting agency determines these matters in the first instance, subject to final review by the Department of Labor or, where as here the offeror (Hess) is a small business, by the Small Business Administration. Shelf Stable Foods, Inc., B-222919, June 24, 1986, 86-1 CPD ¶ 586. The agency has advised us that, contrary to O'Gara's speculation, Hess did in fact certify its status as a manufacturer.

O'Gara next contends that Hess's offer was unacceptable because Hess failed to submit evidence of its "experience, qualifications, and ability to execute the terms of the contract," as the solicitation requested. The solicitation, however, did not require, but merely "requested" submission of this information to "expedite the award" of the contract; there was no provision for review of this information as part of a technical evaluation. Under these circumstances, the information on Hess's qualifications and ability to perform to related responsibility, not technical acceptability, and did not have to be furnished with the firm's proposal. See Dock Express Contractors Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23.

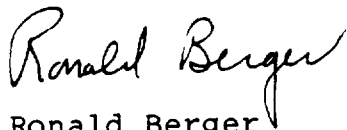
O'Gara argues that Hess breached contractual obligations with O'Gara because its participation in this procurement violates a 5-year non-competition agreement between the parties. Disputes such as this, between private parties, are for resolution through litigation, not the bid protest process. Blair Electrical Construction, Inc., B-225582.2, Jan. 13, 1987, 87-1 CPD ¶ 55.

O'Gara further argues that Hess's bid of \$307,178.00 is an unreasonably low price for the contract indicating either Hess's lack of knowledge as to the time and technology required to fulfill the contract, or Hess's attempt to buy the business. It is well established, however, that there is nothing legally objectionable in the submission and acceptance of a below-cost offer under a solicitation for a firm, fixed-price contract. To the extent that the offered price bears on the firm's ability to perform the contract, this is a matter of responsibility for the contracting agency to determine before award. Our Office does not

review an affirmative determination of responsibility absent a showing of possible fraud or bad faith by government officials or that definitive responsibility criteria have not been met. Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383. Neither exception applies here.

Finally, O'Gara contends that DOD officials promised the firm a sole-source award for the armored cars, but then improperly changed their position and issued a competitive solicitation. The objective of our bid protest function is to promote competition for government contracts. We generally do not look favorably upon protests that a contracting agency should procure supplies or services from a particular firm on a sole-source basis. TSOC, Inc., B-221306, Feb. 26, 1986, 86-1 CPD ¶ 198. The government is required to obtain full and open competition, 10 U.S.C. §§ 2301, 2304 (Supp. IV 1986), and accordingly DOD acted properly in avoiding a sole-source award and allowing Hess to submit a proposal.

The protest is dismissed.



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